POWERS OF SALE IN AN EXECUTOR IN PENNSYLVANIA.[1]

Since the jurisdiction of the Orphans' Court in Pennsylvania to authorize an executor to sell the real estate of his testator is purely statutory, is limited to the cases specified, and will not be exercised when the power conferred in the will is sufficient,[2] it follows that it is often important to determine whether the executor has power under the will to make the sale in question. This question is frequently of extreme difficulty, and the law in Pennsylvania on some of the points involved is in a most unsatisfactory condition.

The particular point for discussion will be the question whether the executor can confer a good title on the purchaser. If there is no power, or if the power cannot be exercised or has been improperly exercised, the executor's deed will confer no title.[3] Even in this case, it is apprehended, the purchaser will, on equitable principles, be entitled to recover the purchase money when he can do so without loss to the parties beneficially interested in the premises. The latter cannot have both the land and the proceeds of the sale, and the executor who has made an unauthorized sale should not be permitted to retain for his own use the money he has received.[4] Although this principle seems clear, it has been involved in some doubt by a recent decision,[5] further reference to which is omitted through lack of space.

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[1] My learned friend, Henry W. Hall, Esq., of the Philadelphia Bar, suggested the subject of this article as one suitable for discussion, and I am indebted to him for a number of valuable suggestions, although he is not responsible for any of the views I have adopted.

[2] *Ex parte* Huff, 2 Pa. 227 (1845); Peterson's Est., 7 W. N. C. 507 (1879). Sale made under order of Orphans' Court set aside because administrator d. b. n. c. t. a. had power to sell under the will. Gideon's Est., 2 W. N. C. 355 (1876). See, also, Schwartz's Est., 168 Pa. 204 (1895). But see Marshall's Est., 138 Pa. 260 (1890), where the court confessedly made an advisory order.

[3] Downer v. Downer, 9 Watts, 60 (1839); Ross v. Barclay, 18 Pa. 179 (1851); Beeson v. Breading, 77 Pa. 156 (1874). The question as to the validity of the exercise of the power may be raised by the refusal of the purchaser to pay the purchase money, as in the case of Styer v. Freas, 15 Pa. 339 (1850).

[4] Confer, Fidler v. Lash, 125 Pa. 87 (1889); Jacoby v. McMahon, 174 Pa. 133 (1896), s. c., 189 Pa. 1; Tyson's Est., 191 Pa. 218 (1899).

[5] Mulholland's Est., 224 Pa. 536 (1909).

The power to sell is generally conferred in unmistakable language and the words commonly used will clearly appear in the various wills subsequently referred to. A few doubtful cases are collected in the note.[6]

An executor is the person, or, in modern times, frequently a corporation, named to carry out the directions of a man's last will and testament. A testament relates solely to personal property, and a will to real estate, and the latter operates as a devise of the legal title and needs no executor. The office of an executor, therefore, pertains properly to the administration of the personal estate, and the executor has no authority over the real estate, except under a special provision to that effect contained in the will, or by virtue of an Act of Assembly.[7] The power of the executor over the land, therefore, when conferred by will, is regarded as a pure common law warrant in the nature of a power of attorney, and is to be strictly construed. This principle underlies the law governing the operation and effect of the power of sale in an executor. The independent operation of the provisions of the will relating to real estate is well illustrated by the principle which formerly obtained, that an executor who had been given power to sell could sell, even though he had renounced and an administrator *c. t. a.* had been appointed.[8]

All real estate not disposed of by the will descends to the heirs, and many difficult questions of construction formerly arose in deciding whether the title was devised by the will to the execu-

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[6] *In these cases the words used were held insufficient to confer a power of sale:* Clark v. Riddle, 11 S. & R. 311 (1824); Sturgeon v. Ely, 6 Pa. 406 (1847); Herb v. Walther, 6 D. R. 687 (1897). *In these cases the words used were held sufficient to create a power of sale: Ex parte* Elliott, 5 Whart. 524 (1840), *semble;* Morgan's Est., 27 W. N. C. 215 (1890), s. c. 9 Pa. C. C. 119, 20 Phila. 60, 47 L. I. 466. See Roland v. Miller, 100 Pa. 47 (1882); Arrott's Est., 9 Pa. C. C. 535 (1891) "I order my hereinafter named executor to convert my effects, excepting as excepted, into money as soon as can reasonably be done and make distribution as designated," Schropp v. Schaeffer, 2 D. R. 362 (1892).

[7] The subject of powers of sale in an executor under the provisions of Acts of Assembly lies outside the scope of this discussion.

[8] For case of such a sale held valid, see Moody v. Fulmer, 3 Grant, 17 (1854). As pointed out by Tilghman, C. J., at p. 30, the difficulty will no longer arise, the power of sale being vested in the administrator c. t. a by the Act of Assembly hereinafter referred to; see n. 9, *post.* See also, Miller v. Meetch, 8 Pa. 417 (1848).

tor or whether he had merely a naked power to sell land, the title to which was in the heir or devisee. So also it was frequently important to determine whether the power of sale was a power incident to the office of executor, a power *virtute officii*, or whether it was a collateral trust.

With the exceptions hereinafter referred to, these questions are no longer material in Pennsylvania, owing to several statutes which have been passed.[9] The legislation, and the practical inconveniences it was designated to remedy, can best be discussed under the several cases in which the questions of construction we have just referred to were formerly material. These are as follows:

(1) Where there is a power of sale, but it is not specifically conferred on the executor; this is a case of failure of the testator to properly confer the power. (2) Where there are two or more executors and one or more die, the case of surviving executor. (3) Where there are two or more executors, and one or more renounce; the case of remaining executor. (4) Where the executor or executors are all dead, or have all renounced, and an administrator *c. t. a.* has been appointed.

The first of the cases to which we have referred is that where there is a power of sale contained in the will, but the executor is not specifically designated as the person to execute the power. In this case it was often a doubtful question whether the power should devolve upon the heir-at-law as trustee or upon the executor.[10] The general rule was, that where the power was incidental to the office of executor, it was to be exercised by the executor, but in other cases it was to be exercised by the heir or devisee.[11] Under the legislation we have referred to,[12] the

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[9] Act March 12, 1800, Secs. 1, 2, 3, 4; 3 Sm. Laws, 433; Act February 24, 1834, Secs. 12, 14, 43, P. L. 70; Act April 22, 1856, Sec. 8, P. L. 532.

[10] See remarks of Rogers, J., in Boshart v. Evans, 5 Whart. 551, at 561 (1840); 1 Sugden on Powers, p. 134, *et seq.*

[11] In these early cases, where no one was named to execute the power of sale, a sale by an executor was proper and passed a good title, Lloyd's Lessee v. Taylor, 2 Dallas, 223 (1795), s. c. 1 Yeates, 422. Direction to sell after death of widow and divide proceeds among children, Jenkins Lessee v. Stouffer, 3 Yeates, 162 (1801). Sale by surviving executors; power similar to above Silverthorn v. McKinster, 12 Pa. 67, 1849.

[12] Note 9, *ante*.

executor in such case may execute the power under the authority of the Orphans' Court.[13] If an executor assumes to execute such a power without the authority of the Orphans' Court, the power, as it is said, is not divested and no title is conferred,[14] and the contract cannot be specifically enforced in the Common Pleas.[15] It is now, therefore, a question of construction whether the power is specifically conferred.[16] Where, however, a sale has been made and deed delivered, the executor may report the transaction to the court, and a confirmation, after notice to all parties, will cure the defect,[17] and in this case it seems that the executor may now sell under the Price Act.[18]

Under the old law there were cases where a surviving or remaining executor could execute the power of sale.[19] The question whether the power could be exercised by a surviving executor depended very largely upon whether the power was a power vested in the executors by virtue of their office or whether it was a collateral power. Under the legislation referred to[20] the necessity of drawing any distinction in these cases is obviated,

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[13] The Act of February 24, 1834, Sec. 12, P. L. 70, merely regulates the mode, is consistent with the Act of March 12, 1800, Sec. 1, 3 Sm. Laws, and is not repealed by the Act of April 22, 1856, Sec. 8, P. L. 532.

[14] Bell's App., 66 Pa. 498 (1870).

[15] Mussleman's App., 65 Pa. 480 (1870).

[16] In these cases, arising since the passage of the act, the court held that the power was not specifically conferred, and therefore a sale under the authority of the Orphans' Court was proper, Woods' Est., 1 Pa. 368 (1845); *semble;* McFarland's App., 37 Pa. 300 (1860); Myers's App., 62 Pa. 104 (1869). Upon petition by legatee, the court ordered the executor to sell under the act, saying the case was doubtful, but that the jurisdiction was wholesome and ought not to be restrained by circumstances of mere implication, Houck v. Houck, 5 Pa. 273 (1847). The executor may maintain ejectment without the order of the Orphans' Court. Kirk v. Carr, 54 Pa. 285 (1867). In this case, the power was specifically conferred and it was not necessary to obtain the approval of the Orphans' Court, Gray v. Henderson, 71 Pa. 368 (1872).

[17] Bell's App., 71 Pa. 465 (1872).

[18] For such a case, see Freker v. Berg, 193 Pa. 442 (1899). The reference of McCollum, J., in the opinion in this case, to the Act of 1834, and the cases of Myers' App., 62 Pa. 104 (1869), and Bell's App., 71 Pa. 465 (1872), are somewhat obscure.

[19] Remarks of the court in Livingood v. Heffner, 21 W. N. C. 148 (1888). For a case of a sale by a surviving executor under will dated 1775, see Lessee of Zebach v. Smith, 3 Binney, 69 (1810).

[20] Note 9, *ante.*

and the surviving executor[21] or remaining executor[22] may exercise the power of sale.

The renunciation, however, must be by a writing filed of record, and where the deed is made by less than the whole number, no renunciation by the others having been filed of record, the deed will vest no title under the power, and the defective execution cannot be cured by a subsequent renunciation even though duly filed.[23]

In the cases which we have just discussed,[24] there is now no occasion to draw any distinction between the power of sale vested in the executor by virtue of his office and collateral powers of sale in trust. The object of the legislation on the subject[25] was to do away with this distinction. In the case, however, to which we shall now direct our attention, that where the office of executor is vacant by death or resignation, and an administrator *c. t. a.* has been appointed, the Supreme Court has said that where the power of sale is *virtute officii*, it devolves on the administrator *c. t. a.*, but that when it is collateral, it is to be exercised by a substituted trustee. This question of the nature of the power is of considerable difficulty, and the cases will now be considered in chronological order.

The first case appears to be Meredith's Estate,[26] where there was a general power of sale given to the executors,[27] without any purpose disclosed. A petition was presented by some of the devisees for a decree directing the administrator *c. t. a.* who had been appointed, to sell and distribute the proceeds according to

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[21] Accordingly, in these cases the surviving executor properly executed the power: Miller v. Meetch, 8 Pa. 417 (1848). In O'Rourke v. Sherwin, 156 Pa. 285 (1893), the three executors were also devisees of life estates in the land, and the survivor of the three, it was held, could make a good title under the power.

[22] Sale by remaining executor valid, McDowell v. Gray, 29 Pa. 211 (1857). See Miller v. Meetch, 8 Pa. 417 (1848), for a discussion of what amounts to a renunciation.

[23] Herron v. Heffner, 3 Rawle, 393 (1834), Act of 1800; Neal v. Beach, 92 Pa. 221 (1879).

[24] (1) Where power of sale is not specifically conferred; (2) case of surviving or remaining executor.

[25] See note 9, *ante*.

[26] 1 Parson's Eq., 433 (1850).

[27] Sharswood, J., in Evans v. Chew, 71 Pa. 47, at 57 (1872), said that this was a power of sale for the payment of debts.

law and the terms of the will, and a decree was made accordingly, the court deciding that the power was one proper to be exercised by the administrator *c. t. a.*[28]

In Ross v. Barclay,[29] a testator, domiciled in New York, gave and devised the residue of his estate unto his executors therein named, in trust, to accumulate the income until the death of his wife, and then to be distributed, with general power of sale contained in a subsequent clause. The will was proved in the City of New York, and the two executors who took out letters there renounced, and letters of administration *c. t. a.* were issued to an individual in Pennsylvania. It was held, that the administrator could not execute the power of sale; that the renunciation of the executorship and trust, so far as the lands in Pennsylvania were concerned, was void. Gibson, C. J.,[30] said, "The transfer of real property is governed by the *lex loci rei sitae;* and no statute of Pennsylvania empowers an administrator, with the will annexed, to execute a trust of land confided to an executor by title or by name, for any other purpose than to sell for payment of debts. By force of the Act of the 24th of February, 1834, relating to executors and administrators, he may execute a power to sell in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose; for instance, to manage the property and invest the proceeds for accumulation; or to maintain the widow and children; or to turn the land into money for the convenience of partition; or to exercise any discretionary power confided to his predecessor in the administration for his personal fitness and fidelity." In Shalter's Appeal,[31] where the testator directed the residue of his estate to be sold at public sale as soon after his decease as may be, so that it be done within one year, the sale was made in 1840,

[28] King, J., in delivering the opinion of the court, pointed out that the provisions of the Act of 1800, giving the power to the administrator c. t. a., were omitted from the Act of 1834, and only conferred inferentially by the 43rd section of that act and the declaratory provisions of the Act of April 22, 1856, Sec. 8, P. L. 532. It seems clear, however, in view of the later cases, where an administrator c. t. a. has been held competent to execute a power of sale, that the doubt suggested by the learned judge no longer exists and may, therefore, be dismissed without further comment.

[29] 18 Pa. 179 (1851).

[30] At p. 183.

[31] 43 Pa. 83 (1862).

the testator having died in 1836. The court held that the power was properly exercised by the administrator *c. t. a.* It did not appear why the sale was made or what disposition the administrator *c. t. a.* made of the proceeds of the sale. The circumstance that the sale was directed so soon after the decease of the testator seems to indicate that it was necessary for the purpose of settling the estate. The case arose on a proceeding by the widow to charge the purchaser from the administrator *c. t. a.* with the amount of her interest under the will, and the court entered a decree directing the administrator *c. t. a.* to pay the amount due her. The sale was perhaps for the purpose of distribution, and there is very little discussion of the point in the opinion in the case. In Keefer v. Schwartz,[32] the direction was as follows: "I direct my executors to sell my house and lot after my death to the best advantage as soon as may be," with a probable, although not clearly stated in the report, disposition of the proceeds. The court said, in an opinion by Strong, J., "The executors were not made testamentary trustees of the property. They were directed to sell for distribution. Their duties and powers were official, by virtue of their office. When they renounced, their duties and powers devolved upon the administrator with the will annexed, by virtue of the 3d section of the Act of March 12th, 1800, continued in force by the Act of 20th February, 1834. See Meredith's Estate, 1 Parsons, 433." This case completely disregards the dictum by Gibson, C. J., in Ross v. Barclay,[33] that a power of sale for the purposes of distribution does not pertain to the office of executor. In Waters v. Margerum,[34] the executors were apparently authorized[35] to sell for the purpose of investing the proceeds in trust for certain designated purposes. The court held that the power was not properly executed by the administrator *c. t. a.*, Sharswood, J., saying,[36] "The deed by George K. Waters, administrator *de bonis non*, with the will annexed of George Knoppenberger, unquestionably conveyed no title to the

[32] 47 Pa. 503 (1864).
[33] 18 Pa. 179 (1851).
[34] 60 Pa. 39 (1869).
[35] See p. 42 of the report.
[36] At p. 44.

plaintiff. The power to sell given by the will to the executors was not for the payment of debts, but for the distribution among legatees and for investment. Ross v. Barclay, 6 Harris, 183, decides that such an administrator, under the 67th section of the Act of February 24th, 1834, Pamph. L. 86, may execute a power to sell in order to bring the land into a course of administration, but not to carry out a trust for a collateral purpose, such, for instance, as here, to turn it into money for convenience of partition."

In Evans v. Chew,[37] the testator died in 1835. The sale was made under the power in 1870, the debts having been paid, for the purpose of distributing the proceeds in accordance with the directions of the will, and it was held that the power was properly exercised by the administrator *c. t. a.* Sharswood, J.,[38] repudiated the dictum of Gibson, C. J., in Ross v. Barclay,[39] and his own remarks in accordance therewith in the case of Waters v. Margerum,[40] that a power of sale for distribution did not pertain to the office of executor. This case put the law on a clear footing, that a power of sale for purposes of distribution pertains to the office of executor and devolves on the administrator *c. t. a.* The same principle has been affirmed in a number of later cases;[41] although Ross v. Barclay[42] was followed at that time in a lower court case.[43]

It was furthermore decided that a power to sell in the

[37] 71 Pa. 47 (1872).

[38] At p. 51.

[39] 18 Pa. 179 (1851).

[40] 60 Pa. 39 (1869).

[41] In Gideon's Est., 2 W. N. C. 355 (1876), the words of the will were, "I authorize my executors (naming them), for the better division of my estate, to sell and dispose of my real estate on the decease of my wife, or in case of her marriage, then on the arrival of my youngest child at age, and to grant and convey the same to the purchaser or purchasers thereof." The testator died in 1819; the widow died in 1869, and a sale after widow's death by the administrator *c. t. a.* was valid. In Jackman v. Delafield, 6 W. N. C. 9 (1877), there was a gift of the residue, consisting of real estate, to the executor, with authority to sell and dispose of the proceeds among the testator's children and it was held that the power was properly exercised by the administrator *c. t. a.* See also Wetherill v. Commonwealth, 17 W. N. C. 104 (1885); Lantz v. Boyer, 81 Pa. 325 (1876); Potts v. Breneman, 182 Pa. 295 (1897); Tarrance v. Reuther, 185 Pa. 279 (1898); Pugh's Est., 17 Phila. 509 (1885), L. I., Vol. 42, p. 454.

[42] Hepburn's Est., 8 Phila. 206 (1871), L. I. of 1871, p. 212.

[43] 18 Pa. 179 (1851).

executor devolved on the administrator *c. t. a.*, notwithstanding the circumstance that there was a direction to invest the proceeds of a sale made during the life of a life tenant.[44] It made no difference if the entire estate was given in trust. The devolution of the power depended on the objects for which it was to be exercised. Thus, in Dorff's Appeal,[45] there was a gift of the entire estate, in trust, for testator's wife for life, then to divide the same among his children, with directions that the share of some of them should be held in trust, with power in the executors to sell, in their discretion. The court said, "However, we are clearly of the opinion that the power in the will of James Hunt (the decendent) was vested in his executors *virtute officii*. It was to make distribution, and the fact that the portion of the daughters was to be set aside and held in trust for them, did not change the character of the power. After the sale, had each share separately been directed to be invested in trust, it would still have been a power for distribution and exercised by the executors *virtute officii*. Of course, under the law, as well settled, it survived to the administrator *cum testamento annexo*." The law up to this point, therefore, was fairly well settled, and an opinion could be ventured with some confidence as to a title derived under a power exercised by an administrator *c. t. a.* The Supreme Court, however, in the most unfortunate decision of Gehr v. McDowell,[46] threw the law into confusion and reverted to the position of Ross v. Barclay.[47]

In Gehr v. McDowell the provisions of the will were as follows: "Upon the arrival at the age of twenty-one years of the youngest child of my said son, Elijah, or upon the decease of my said son, Elijah, if he should die without issue, I order and direct my executor to sell all my real estate, subject however to charge of the one-third or dower interest of my wife, Mary, therein, if she should then be living, and pay over to the child or children of my said son, Elijah, and the lawful issue of any

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[44] Wurfflein v. Haines, 14 W. N. C. 76 (1883); see 15 W. N. C. 28 (1884); Livingood v. Heffner, 21 W. N. C. 148 (1888).

[45] 10 W. N. C. 335 (1881).

[46] 206 Pa. 100 (1903).

[47] 18 Pa. 170 (1851).

of them who may then be deceased, having left such issue, the proceeds of such sale." The court below, in an opinion by Stewart, P. J., affirmed on appeal by the Supreme Court without an opinion, held that the power did not pertain to the executor by virtue of his office, and was to be exercised by a substituted trustee, quoting the dictum of Gibson, C. J., in Ross v. Barclay,[48] without noticing the repudiation of that doctrine by Sharswood, J., in Evans v. Chew,[49] and the intervening cases we have cited, deciding that a power for distribution was a power *virtute officii*. In view of this case, it is impossible to state what the law really is. The safer practice now is to have a substituted trustee and an administrator *c. t. a.* appointed. Each one can then exercise the power, and the purchaser's title will thus be good, no matter what view the Supreme Court may take of the question in the future.

It is suggested, however, that the real distinction, which it must be confessed is not supported by the cases, is this: a power of sale is vested in an executor as an executor when the exercise of the power results in the executor handing over the proceeds of the sale to the persons designated in the will as owners thereof. Its exercise, therefore, necessitates an accounting of the proceeds of the sale because of the sale. A power of sale is vested in a trustee as trustee when the exercise of the power simply operates to dispose of the property without disturbing the equitable estate which has been superimposed thereon, and when the trustee or party making the sale is not under any duty of accounting merely because of the sale, but must account for the proceeds of the sale merely as part of his administration of the trust. To put it shortly, in the case of an executor, the power of sale operates to change the ownership, and the executor, on exercising the power and accounting for the proceeds of the sale, has discharged his duties. In the case of the trustee, the exercise of the power does not change or divest the ownership, and the party exercising it continues in his duties as to the proceeds on the same trusts as were before imposed on the title which he sold.

Where there was a naked power to sell in the executor, sev-

[48] 18 Pa. 179 (1851).
[49] 71 Pa. 47 (1872).

eral questions arose as to the survival of the power and exercise thereof, and it was often a difficult question of construction to decide whether there was a naked power or a devise to the executors to sell.[50]

In Pennsylvania, this difficulty was obviated by the Act of February 24, 1834,[51] which, in effect, provided that every executor having a naked authority, *inter alia,* to sell land conferred by will, should have, for the purposes of the sale and conveyance, the same interest as if the land had been devised to him to be sold. Although this Act has produced great confusion in the minds of the judges, so that the observations on it in the books are far from uniform, it simply has, so far as the execution of the power is concerned, the effect of enabling the executor, who has a naked power of sale, to pass the title by the exercise of the power, even though the title is vested in the devisee or heir, and we may therefore dismiss from this discussion any extended reference to the distinction between the case of a naked power in the executor and a devise to the executor to sell. Except that in the case where the power is nugatory, or, having once been valid, has become, for some reason, exhausted, void, or in such state that it cannot be exercised, there is a slight distinction in the theory involved in the disposition of the property directed to be sold. If there is a devise of the legal title or an intestacy with the naked power, the naked power, becoming void, drops and the title remains exactly where it was before. Where, however, there is a devise with power to sell, and the power cannot for any reason be exercised, the executor holds the legal title in trust, and as in such case there is generally no disposition under the will, there is a resulting trust to the heir-at-law. In this case it is undoubtedly better practice for the heir to take a conveyance of the legal title from the executor, and if there is any question as to whether the power is still in existence, the executor should convey under the power for a nominal consideration.

It sometimes happens that a testator will fix a certain period of time within which or after which a sale is to be made.

[50] Thus, where there was a naked power to sell under the old law, the power could not be exercised by the administrator c. t. a., Moody v. Vandyke, 4 Binney, 31 (1811).

[51] Sec. 13, P. L. 70.

When there is a direction to the executors to sell within a certain period, they have a discretion to sell at any time within the period, and a sale at any time after the period will pass a good title,[52] for the reason that there is a direction to sell which entitles the donees of the proceeds to compel a sale, and they cannot be deprived of the right because of the failure of the executor to sell within the period.

But where there is merely a discretionary power to sell within a certain period, there is no one who has a right to compel the sale, and the authority, therefore, ceases at the time fixed, and a sale after the time will confer no title.[53]

Where there is a gift of a life estate and a power of sale to be exercised at the death of the life tenant, for whose benefit the sale can be said to be postponed, the power may be exercised before the decease of the life tenant with the latter's consent.[54]

A direction not to sell until after the expiration of a certain

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[52] Direction to sell on or before the first day of April next and distribution of the proceeds, a sale after the time was valid, Miller v. Meetch, 8 Pa. 417 (1848). There is an error in the third paragraph of the syllabus of this case. The phrase "sell so much of the real estate as they think proper," should be "sell either at public or private sale as they may judge proper." Consequently, an administrator d. b. n. c. t. a. is properly charged with the proceeds of a sale made by him after the period. Shalter's App., 43 Pa. 83 (1862); Fredericks v. Kerr, 219 Pa. 365 (1908). In Brisben's App., 70 Pa. 405 (1872), there was a direction not to sell within two years except at a certain price, and no question as to the validity of such direction was raised.

In Roland v. Miller, 100 Pa. 47 (1883), the testatrix directed that her real estate should not be sold until ten years after her decease, but that if her executors should lease the property for fifteen years, they should not be compelled by her heirs to sell the same until the expiration of the lease, and then in a subsequent clause further provided that if her executors should think it advantageous, they might sell at any time within said ten or fifteen years. Executors sold land after ten years, within fifteen years. The court held the sale was valid and there was a dictum that the direction to sell was discretionary in the executors during the fifteen years and absolutely after that time. In Waddell's Est., 196 Pa. 294 (1900), where the clause was, "My executors shall sell as soon as the same can conveniently be done," it was held the executors had discretion as to the time of making the sale. So, also, such a discretion cannot be controlled by less than all the legatees, as they all must join to save the executors from the peril of the non-exercise of their own judgment. *Compare*, Marshall's Est., 138 Pa. 260 (1890).

[53] In Herb v. Walther, 6 D. R. 687 (1897), the clause was, "I hereby desire that my executors shall sell * * * within one year after my death," and the court held that it was merely a discretionary power to sell and must be exercised within a year.

[54] Gast v. Porter, 13 Pa. 533 (1850). Life tenant was one of the executors and signified her consent by joining in the deed as executor. Brown's App., 27 Pa. 62 (1856), life tenant was the widow of the testator, and sufficiently signified her consent to the sale by formally electing to take against the will. Hamlin v. Thomas, 126 Pa. 20 (1889), s. c. 24 W. N. C. 4 (1889), consent

period will give a power of sale after the expiration of the period, by implication.[55] The question as to when, under the terms of the will, the power is exercisable, is often a difficult question of construction.[56]

Where the sale is to be made after the happening of a certain event, the executor cannot sell before the happening of the event,[57] and where he attempts to do so, the court will enjoin the exercise of the power.[58]

When the words of the will are such that the exercise of the power may be compelled by the parties beneficially interested, there is said to be a legal power. Why this term should be applied does not clearly appear. The question whether the exercise of the power can be compelled depends on the whole scheme of the will and the adjustment of the conflicting rights of the parties entitled to the proceeds of the sale, and the parties, if any, interested in having the sale postponed. In no event does the solution of this question affect the title which the executor confers under the deed. It is not necessary, therefore, to make any extended reference to the subject.[59]

Even where there is a power of sale in a will, the court may control the executor in the exercise thereof and review,

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of the life tenant may be shown by oral testimony. Statute of Frauds does not apply. Styer v. Freas, 15 Pa. 339 (1850), s. c. 21 Pa. 86, 2 Grant's Cases, 453, life tenant joined in the deed. Coover's App., 74 Pa. 143 (1873), widow was life tenant and elected to take against the will, and the executor, it was held, could exercise the power immediately. These decisions probably overrule the earlier case of Sweigert v. Fry, 8 S. & R. 299 (1822).

[55] Inquest of partition before the expiration of the period was set aside, Palmer's App., 1 Amer. Law Reg. 439 (1853).

[56] See Smith v. Folwell, 1 Binney, 546 (1809).

[57] Hay v. Mayer, 8 Watts, 203 (1839), where the power of sale at the death of the daughter was postponed by the intervention of an estate as tenant by the curtesy in her husband. The attempted sale before her death was void, anyhow, as it was not a due execution of the power. In Loomis v. McClintock, 10 Watts, 274 (1840), there was a devise of certain premises to a daughter, Sarah, until such time as her daughter Catherine shall have attained the age of twenty-one years; or, in case of Catherine's decease, until such time as she would have been twenty-one years old if living, and then to be sold by testatrix's executors and the proceeds divided, etc. The executors sold the property nine years before Catherine's twenty-first birthday, and it was held the sale was void.

[58] McLane v. McLane, 207 Pa. 465 (1904).

[59] In Severns's Est. (No. 2), 211 Pa. 68 (1905), the court compelled the exercise of the power. In Peterson's Est., 7 W. N. C. 507 (1879), the court declined to interfere, and in Bruner v. Naglee, 7 Phila. 384 (1870), L. I. 1870, p. 196, the court declined to stop the executors from selling.

set aside and, if necessary, order a re-sale of the property when there are circumstances of fraud, abuse of trust or inadequacy of price.[60] It may be observed here that the sale cannot be set aside unless the purchaser is a party to the proceeding.[61]

A question of construction frequently arises as to what portion of the testator's estate is subject to the power of sale vested in the executor. A few of these cases are collected in the note.[62]

When the executor has a power of sale to be exercised immediately on the death of a certain person, he is not thereby authorized to grant an option on the property for a certain period because the option may defeat the direction for an immediate sale, and operate to deprive the executor of his discretion in exercising the power conferred.[63]

The question is frequently raised as to whether a power of sale includes a power to mortgage.[66]

In Wurfflein v. Haines,[69] there was a power in the executor "to bargain and sell, convey and absolutely dispose of all or any portion of my real estate," etc., and a mortgage by the administrator *c. t. a.* was sustained.

In McCreary v. Bomberger,[70] there was a devise and bequest to testator's wife, A, "to have and to hold for and during her natural life, and at the death of my said wife, all the property, * * * or so much thereof as may remain unexpended to be in trust, * * * and further, if at any time it should be deemed

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[60] For cases of exercise of such control, see (Inadequacy of price) Pollard v. McFillen, 6 Phila. 125, L. I., Vol. 23, p. 117 (1866). (Collusion, inadequacy of price) Hauck's Est., 37 Pitts. L. J. 8 (1889); see also, Daily's App., 87 Pa. 487 (1878). For cases where the sale was not set aside, see: (Price adequate) Dietrich's Est., 1 Lehigh Val. L. R. 193 (1886). (No fraud) Andrews' Est., 6 D. R. 24 (1897).

[61] Dundas's App., 64 Pa. 325 (1870), s. c. 27 L. I. 149, 2 Leg. Gaz. 145, affirming 7 Phila. 518, 26 L. I. 412.

[62] Downer v. Downer, 9 Watts, 60 (1839); Beeson v. Breading, 77 Pa. 156 (1874); Swan v. Covert, 138 Pa. 306 (1890); Penna. Co. for Ins. on Lives, &c., v. Leggate, 166 Pa. 147 (1895); Eisenbrown v. Burns, 30 Pa. Sup. Ct. 46 (1906).

[63] Consequently, a bill in equity by the holder of the option for specific performance was dismissed, Hickok v. Still, 168 Pa. 155 (1895).

[66] For a case of an express power to mortgage, and construction of what mortgage was authorized thereby, see Miller v. Schlegel, 10 W. N. C. 521 (1881).

[69] 14 W. N. C. 76 (1883), s. c. 15 W. N. C. 28 (1884).

[70] 151 Pa. 323 (1892), s. c. 31 W. N. C. 41, reversing 11 Pa. C. C. 68.

advantageous to dispose of (the premises), my said executrix * * * is hereby authorized and empowered to sell and dispose of the same, the proceeds to be re-invested in or secured by other real estate subject to the same conditions." A was appointed executrix of the will, and made a mortgage which was joined in by the trustee for the remainderman, and it was held that the power to sell was well executed.[71]

It is now generally accepted as the law that a mortgage is a valid execution of a power of sale vested in an executor, although, perhaps, in view of the phraseology in the wills we have referred to, it will be safer to confine this statement to the case where the words are "sell and dispose of."

There is the further qualification that the mortgage must be for the benefit of the estate. It is consequently necessary to inquire what is to be done with the proceeds of the mortgage, although, it is apprehended, the mortgagee is not under any liability to see to the application of the mortgage money. A number of cases will therefore occur where, although the words of the power are, under the decisions, apparently sufficient to justify the execution of a mortgage, yet the other provisions in the will preclude the conclusion that the testator intended to authorize the giving of a mortgage. This is probably the case where an absolute conversion is contemplated,[72] and also in most cases of a power of sale vested in a trustee. Here the power is for the purpose of investment and re-investment, and enables the trustee to procure a higher rate of income for the *cestui que trust*. A mortgage is in such a case inconsistent with the notion of producing a revenue, and the execution of the mortgage will therefore frequently be an improper exercise of the power.[73]

The deed of the executor under the power should be drawn and executed in his official capacity, refer to the power and purport on its face to be in execution thereof, for the rule of law

[71] It is to be remarked that the clause "so much as may remain unexpended" gave the life tenant rather extensive power over the property, independently of the express power to sell, and as the mortgage was made by her in her individual capacity, it could well be referred to that clause in the will and not to the power.

[72] Dictum, Sterrett, C. J., in Freeman's Est., 181 Pa. 405 (1897), at 411.

[73] For a case of a mortgage held to be a valid execution of a power of sale in a trustee, see Zane v. Kennedy, 73 Pa. 182 (1873).

is that the executor must have, as it is said, an intention to execute the power, and that intention must appear in the transaction. The formalities referred to clearly show that the intention to execute was present. Where, however, the deed recites the power, it has been decided that the circumstance that it is drawn and executed by the executor as an individual is immaterial, and the power, notwithstanding, is well executed, even if the executor has also an individual interest in the property.[74]

So also if the executor has no individual interest in the land which he can convey, a deed in his individual capacity will be a good execution of the power, even though it contains no reference thereto, for the reason that the deed cannot take effect at all unless it takes effect as an execution of the power, and since it cannot be presumed to be executed without an intention that it shall be valid, the intention to execute the power is presumed.[75]

Where, however, the executor has an interest in the premises which can be conveyed and executes the deed in his individual capacity without referring to the power, the deed will operate on the interest and will not be an execution of the power, since it can take effect either way, and the intention to execute the power does not clearly appear.[76]

In McCreary v. Bomberger,[77] the executrix made a mortgage in her individual capacity purporting to execute a power of sale conferred upon her as executrix of the will. The executrix had also a life estate in the property. The court held, in an opinion by Paxson, C. J., that the circumstance that there was no reference to the power in the mortgage was immaterial, as there was abundance of evidence, from the circumstances surrounding the transaction, that there was an intention to execute the power, and that these circumstances were the application of the proceeds of the mortgage to the trust property, and the fact that the trustee for the remainderman joined in the execution of

[74] Miller v. Meetch, 8 Pa. 417 (1848); Wynkoop v. Wynkoop, 10 W. N. C. 65 (1881).

[75] Allison v. Kurtz, 2 Watts, 185 (1834); Jones v. Wood, 16 Pa. 25 (1851).

[76] Hay v. Mayer, 8 Watts, 203 (1839); Robeno v. Marlatt, 136 Pa. 35 (1890), s. c. 26 W. N. C. 385, reversing 6 Pa. C. C. 251, 46 L. I. 36.

[77] 151 Pa. 323 (1892), s. c. 31 W. N. C. 41, reversing 11 Pa. C. C. 68.

the mortgage, for if the executrix had intended to bind only her life estate, the joinder of the trustee was wholly unnecessary. It is submitted that this case tends to introduce an element of uncertainty into the question of what is a due execution of the power, in so far as it lays down the principle that the question of the intent to execute can be inferred from circumstances other than those clearly appearing upon the face of the title.

Where there is a power of sale in an executor, and he executes a deed purporting to be for a consideration, the deed is a good execution of the power, and no evidence can be admitted to show that no consideration actually passed. The averment in the deed is conclusive as to its operation as a deed of bargain and sale.[79] It is clear, however, that fraud or collusion between the executor and the purchaser may be shown just as in any other case of fraud.[80] In the absence of fraud, the consideration cannot be inquired into in order to invalidate the title passed by the exercise of the power,[81] and particularly is this true as against a subsequent purchaser for value without notice.[82] Of course, even if the title passes to the purchaser, the donees of the proceeds of the sale may hold the executor to account for neglect in obtaining or securing the consideration or in not securing a proper price.[83] This question, of course, has no effect on the passing of the title by the deed of the executor.

When the testator requires that the sale be made with the consent of one or more persons, the validity of the exercise of the power is conditioned on that consent, which must be personal and cannot be given by any one else. It seems that the consent is revocable up to the time of the delivery of the deed unless founded on a valuable consideration.[85] Consequently,

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[79] Allison v. Kurtz, 2 Watts, 185 (1834). See, also, the case of a power to sell a fee subject to an executory devise, Barnet v. Deturk, 43 Pa. 92 (1862).

[80] See Price v. Junkin, 4 Watts, 85 (1835).

[81] Shippen v. Clapp, 29 Pa. 265 (1857); White v. Williamson, 2 Grant, 249 (1858).

[82] Cadbury v. Duval, 10 Pa. 265 (1849).

[83] See Shippen's Heirs v. Clapp, 29 Pa. 265 (1857); Mitchell's Est., 1 Leg. Gaz. 74 (1869), s. c. 1 Pears. 428. This question, of course, has no effect on the passing of the title by the deed of the executor.

[85] Accordingly, the assent was permitted to be withdrawn in Kling v. Hummer, 2 P. & W. 349 (1831).

if the person designated dies, the power cannot be exercised; if given to two or more, it does not survive, and when one dies without the consent having been given, it cannot ever thereafter be exercised.[86] In Hackett v. Milnor,[87] there was a direction to an executor to sell with the consent and approval of three daughters. One daughter died, and a sale approved by the other two was held to pass a good title. In this case, however, under the limitations of the will, the two surviving daughters were practically the sole and absolute owners of the property, and, of course, could not be deprived of their right to make a sale or consent to a sale because of the death of their sister.

In most cases of a power of sale conferred upon an executor there is such a direction to sell as will involve the application of the doctrine of equitable conversion. As was well said, however, by Clark, J., in Livingood v. Heffner,[88] the question of whether there is an equitable conversion is immaterial in determining whether the executor can make a good title under the power. There may be a valid power of sale which does not amount to an equitable conversion, and it does not follow that because the executor cannot be compelled to exercise the power of sale that he cannot exercise it voluntarily.

Questions unconnected with the question of the validity of the power of sale frequently arise between the purchaser and the executor as to their rights and duties under the contract.[89] Furthermore, any power of sale conferred upon an executor is subordinate to the rights of any third parties in the land which attach in the lifetime of the testator. The latter cannot by giving a power of sale put his executors in a better position than he occupied himself.[90] So also the vendor under articles of agreement may die pending the execution of the agreement, and a question be raised as to the effect thereon of a power of sale conferred on his executors.[91]

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[86] Kling v. Hummer, 2 P. & W. 349 (1831).

[87] 156 Pa. 1 (1893).

[88] 21 W. N. C. 148, at 149 (1888).

[89] See Morgan's Est., 27 W. N. C. 215 (1890), s. c. 9 Pa. C. C. 119, 20 Phila. 60, 47 L. I. 466; Cornell v. Green, 10 S. & R. 14 (1823).

[90] Sedam v. Shaffer, 5 W. & S. 529 (1843); Marvine v. Drexel, 68 Pa. 362 (1871).

[91] For such a case see Seitzinger v. Weaver, 1 Rawle, 377 (1829). From

The question whether the sale under the power divests the lien of debts and legacies, is simply another statement of part of the question whether the purchaser is liable to see to the application of the purchase money.[92] Where there is a power of sale for the payment of legacies, a sale under the power does not divest the lien of the debts of the testator, even though the purchaser had no notice of the debt at the time of taking title,[93] for the reason that the purchaser must or ought to know that the debts are a lien on the land, and the testator cannot give his executors power of sale for the payment of legacies to the prejudice of the creditors. In the case of a power of sale for the payment of debts and legacies, a sale under the power discharges the lien of the debts and the purchaser is not liable to see to the application of the purchase money,[94] for the reason that the purchaser cannot see to such application without involving himself in an account of the debts which must be paid first. It may also be noted that a sale under a power for the payment of debts discharges the land from the dower of the testator's widow.[95] So also where there is a devise of the real estate to the executors in trust to sell and apply the net proceeds first to the payment of debts to which the land may be subject and not otherwise provided for, and to distribute the surplus money to testator's children, a sale under the power discharges the lien of the debts.[96] Where there is a direction to sell which amounts to an equitable conversion, the land is turned into personal property at the death

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this case it appears that the executors cannot assent to the introduction of a new vendee, and a conveyance to such vendee will be void.

[92] For a statement of the English equity rule on the subject, see remarks of Bell, J., in Cadbury v. Duval, 10 Pa. 265 (1849), at pp. 267, 268.

[93] Hannum v. Spear, 1 Yeates, 553 (1795).

[94] Grant v. Hook, 13 S. & R. 259 (1825). See this case for a discussion of what amounts to a charge or schedule of debts in the will.

[95] Mitchell v. Mitchell, 8 Pa. 126 (1848).

[96] Cadbury v. Duval, 10 Pa. 265 (1849). The executors made a conveyance to the widow purporting to be for a consideration which, however, did not pass, and she made a mortgage thereon for the purpose of raising money to pay the debts, and failed to so apply the proceeds of the mortgage. This mortgage was foreclosed, and a controversy arose between the creditor of the testator and the mortgagee over the distribution of the fund raised by the sale. The court said that the mortgagee was a purchaser for value without notice of the nominal character of the conveyance to the widow; that the deed on its face was valid as to him, and the exercise of the power discharged the lien of the debts. McCartney's Est., 18 Phila. 35 (1886). Acc.

of the testator, the creditors have no lien on the land and can come in on the fund raised by the sale whenever the land is sold.[97] But where there is a general discretionary authority to sell real estate not amounting to an equitable conversion, the exercise of the power does not discharge the lien of the decedent's debts, even though the power expressly exempts the purchaser from the liability of seeing to the application of the purchase money.[98]

The question, therefore, whether the exercise of the power divests the lien of the debts and legacies, depends on the express purpose of the power, and it is not always easy to determine whether the power in question is sufficient to relieve the purchaser from the liability to see to the application of the purchase money.

This question, however, has lost much practical importance in so far as the lien of debts is concerned, because of the provisions of the Price Act, under which executors may have the sale approved and the lien of debts discharged, even though there is a power of sale conferred in the will.[99] The purchaser may also pay the money into court under the provisions of the Acts of February 24, 1834,[100] and May 17, 1866,[101] and take title free from any lien. It is undoubtedly of practical advantage to have the sale ratified by the court and all questions removed rather than have the title depend on a nice question of law as to whether the exercise of the power will divest the lien of the debts and legacies. This question, of course, will not arise after the statutory period for the lien of debts has passed.

The statement that a power is exhausted is often misapplied. Properly speaking, it means that the power is used up, but it is often applied where the power has never been, or never can be used, for some reason or other, such as the lapse of the time fixed for its exercise or because the event upon which it was to be exercised can never happen.[102]

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[97] McWilliams' App., 117 Pa. 111 (1887); Mustin's Est., 194 Pa. 437 (1900); 58 University of Pa. Law. Rev., p. 492.

[98] Seeds v. Burk, 181 Pa. 281 (1897).

[99] Wainwright's Est., 11 Phila., 147 (1876), s. c. 33 L. I. 280.

[100] Sec. 19, P. L. 70.

[101] Sec. 2, P. L. 1096.

[102] See Swift's App., 87 Pa. 502 (1878).

Where the power has once been exercised, it has been exhausted and never can be exercised again.[103] As said by a learned judge,[104] the execution of the power cannot be repeated. This principle is clear and universally accepted, and proceeds upon the very simple reason that the executor has, by the exercise of the power, disposed of the title to a third person, and, as it has thus passed out of his control, he can no more sell it again than he can any other title which he does not own.

Since the power of sale is a common law power to be strictly construed, and since the heir cannot be disinherited unless by some express provision in the will, and the devisees must take unless something else in the will directs otherwise, a power of sale can only be valid when it is (1) to pay debts; (2) to satisfy charges provided in the will; (3) to provide for the distribution or division of the property; (4) to provide for a valid gift of the proceeds of the sale;[105] (5) to provide for investment and re-investment of the trust property, upon which an equitable estate is superimposed. This last case, that of power of sale in the trustee, lies outside our discussion and will be briefly referred to at this point only in the interest of clearness.[106]

A common form of a power in a trustee is where there is a trust created for life with limitations over on the death of the life tenant, and a power is vested in the executors or trustees to

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[103] See *Ex parte* Elliott, 5 Whart. 524 (1840). Power of sale exhausted by sale of ground rent, no power left to extinguish the rent.

[104] Gibson, C. J., in *Ex parte* Elliott, 5 Whart. 524 (1840). In this case there was a conveyance reserving a ground rent, and the court intimated that the power was thereby exhausted, and the executors could not release or extinguish.

[105] (1) A power to sell for the purpose of distributing the proceeds amongst persons who are named or described in the will is a power which belongs to the executor *virtute officii*. (2) Where there is no limitation as to the time of the exercise of the power of sale given to the executors in a will, the same may be controlled within a certain period, ascertainable from the general scheme and purpose of the will. (3) The duration of an executor's power to sell real estate depends upon the intent of the testator, and where the will shows that the testator gave this power for a particular purpose, the power ceases to exist after that purpose has been accomplished or has become impossible or unattainable. (4) Where power is given by will to executors to sell real estate, with a view to the distribution of the proceeds among legatees, such power belongs to the executors *virtute officii*. Livingston, P. J., in the court below, in Potts v. Brenzman, 182 Pa. 295, at 300 (1897).

[106] For a few cases of a power to sell in a trustee, see Cresson v. Ferree, 70 Pa. 446 (1872); Marshall's Est., 138 Pa. 260 (1890); Seeds v. Burk, 181 Pa. 281 (1897).

sell and re-invest on the same trusts during the life tenancy. In such case, the power falls at the death of the life tenant, the time of the termination of the trust.[107] Where, however, the executor has duties of distribution to perform at the termination of the life estate, the power is to be referred to the third class we have mentioned.[108]

Where the power of sale is to provide for the payment of debts, we have already pointed out that the purchaser takes a title free from the lien of the debts and is not liable to see to the application of the purchase money. He is, therefore, not liable to inquire as to the existence of the debts or the necessity of selling the real estate for their payment.[109]

Nothing has been found in the books in Pennsylvania which sheds any light on the question of how long after the death of the testator a power of sale for the payment of debts may be exercised. Whether the limitation of the lien of debts to two years has any effect in the matter, has not been decided.

The case of a power to sell to provide for charges or legacies created by the will is clear and not of frequent occurrence. The power may be expressly conferred or may be implied from the granting of the charge. In either case the exercise of the power

[107] Wilkinson v. Buist, 124 Pa. 253 (1889), executor had sold two years after the death of the widow, who was life tenant, to A. A sold to B. B agreed to sell to C, and in an action of assumpsit by B against C for the contract price, it was held that he was not entitled to recover as his title was void. Fidler v. Lash, 125 Pa. 87 (1889), the executor sold three months after the death of the life tenant, and accounted for the proceeds in the Orphans' Court. Sixteen years after the sale, the residuary devisees brought ejectment against the parties claiming under the purchaser from the executor, and recovered.

[108] *E. g.*, see Livingood v. Heffner, 21 W. N. C. 148 (1888).

[109] Doran v. Piper, 164 Pa. 430 (1894). In this case the limitations were as follows: "First, I give and bequeath unto my beloved wife, Charity, my entire estate real and personal so long as she may remain my widow, but should she marry again she shall be entitled then to what the law allows widows commonly. I direct that my beloved wife pays all my just debts, and raises my children in the love and fear of God, and after the death of their mother my will is that my estate be equally divided amongst all my children, and I further direct that should it be necessary on account of debts now or debts that may accrue in maintaining the family, my wife will be privileged to sell a portion of the real estate. And I direct that my wife, Charity, be my sole executor in settling up my estate, etc., hereby revoking all former wills by me made." The executor sold, and one of the children as residuary devisee brought ejectment against the purchaser, and judgment for the defendant was affirmed, the court saying that it was not necessary for him to show any necessity for the sale or the existence of debts. See also, Eisenbrown v. Burns, 30 Pa. Super. Ct. 46 (1906).

is valid and confers a good title on the purchaser, and he is not liable, as we have seen, to see to the application of the purchase money. In Adams's Estate,[110] there was a naked authority to sell to pay debts and legacies, and the heir-at-law, of course, took the title subject to the power, the exercise of which they sought to restrain by offering to pay the legacies. The court held the executors could sell nevertheless.[111]

Where the power is to sell for the purpose of distribution, the power will not survive the time fixed for the distribution.[112] This period is usually the dropping of one or more lives, but as the sale obviously cannot be made *eo instanti* on the death of the life tenant, there must be a reasonable time after his decease for the executors to make the sale. No case has been found deciding what that period is.

Thus, where there is a gift of the proceeds of the sale and a power to sell or direction to sell and pay over the proceeds to the persons designated, the power will be exercisable so long as there are any objects to which the proceeds can be applied, and in most cases, if there is more than one object, they are clearly separable and the failure of one will not affect the others.[113]

Where the objects of the gift fail, as where they are contingent and the contingency upon which the gift was to take effect has failed,[114] or where the gift of the proceeds is invalid under the act relating to charitable gifts,[115] the power drops and

[110] 148 Pa. 394 (1892).

[111] For a criticism of this case, see Vol. 58, Univ. of Pa. Law Rev., p. 485.

[112] Githens's Est., 24 Pa. C. C. 248 (1900), obscurely reported, words of will not given.

[113] In Evans's App., 63 Pa. 183 (1869), there was a naked direction to sell, with a gift of the proceeds, some of which failed. The executors undertook to sell to pay some legacies still remaining unpaid, and it was held that the heirs had no standing to interfere with the discretion of the executors.

[114] In Smith v. Folwell, 1 Binney, 546 (1809), there was a direction to sell and a gift of the proceeds of the sale to four brothers and sisters, or such of them as should be living at the death of John. The court construed the gift of the proceeds of the sale to the brothers and sisters to be contingent on their being alive at the death of John, and as they were all dead at that time, there was no reason for the exercise of the power, and it was held that the sale which had been made by the executor was void.

[115] In Lufberry's App., 125 Pa. 513 (1889), there was a naked direction to sell with a gift of the proceeds, which failed under the Act of 1855 relating to gifts to charities, and it was held that the title was in the heir-at-law and the personal representatives had no standing to compel a sale. For a further criticism of this case, see Univ. of Pa. Law Rev., Vol. 58, p. 485.

can no longer be exercised with any effect, because the objects for which it was to be exercised have ceased to exist.[116]

The learned reader should recollect that in several of the cases to which we have just referred, the question as to the validity of the power arose in a proceeding by some of the parties interested in the estate either to restrain or compel the exercise of the power. It may be that a distinction can be drawn, although no intimation to that effect has been found in the books, between the case where the question arises before or at the time of the exercise of the power, and in the case where the power has been exercised, the deed delivered, and the purchaser has paid his money. In this latter case, the court should not be astute to put on the purchaser the burden of showing the necessity of the exercise of the power.[117]

In the case we have just discussed, the purpose of the sale was expressed on the face of the power and the exercise of the power was, as we have seen, valid so long as the reason for the sale, as indicated, remained. There are, however, a number of cases where there is a general power of sale conferred without any purpose being disclosed, except so far as may be ascertained from the other provisions of the will. Such a power of sale is, however, conclusively presumed to be for the purpose of paying debts, and may always be properly exercised by the executor within the two years subsequent to the death of the testator.[118] After the expiration of the two years, however, or where the debts are all paid,[119] the power cannot be exercised unless it can be referred to one or more of the particular purposes we have heretofore pointed out.

In Swift's Appeal,[120] a testatrix gave the residue of her

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[116] See Clark v. Campbell and Williamson, 2 Rawle, 215 (1828).

[117] See Doran v. Peiper, 164 Pa. 430 (1894); Eisenbrown v. Burns, 30 Pa. Super. Ct. 46 (1905).

[118] A general power to sell will be conclusively presumed to be for the payment of debts. See remarks of Sharswood, J., in Evans v. Chew, 71 Pa. 47 (1872), at 51.

[119] And a power of sale for the payment of debts is not properly exercised when there are no debts. Robeno v. Marlatt, 136 Pa. 35 (1890); s. c. 26 W. N. C. 385, reversing 6 Pa. C. C. 251, 46 L. I. 36; Wetherill v. Commonwealth, 17 W. N. C. 104 (1885), *semble*. See p. 106

[120] 87 Pa. 502 (1878).

estate to her two sisters, after certain specific devises and general legacies, and authorized and empowered her executors to sell all of her estate, real, personal and mixed wheresoever found. After the payment of the debts and legacies there was a large surplus of cash in the hands of the executors and considerable real estate unsold. There was a petition by the residuary legatees to compel the sale, which was dismissed, the executors having sold all that was necessary to carry out the provisions of the will, and the court said the power was exhausted. For a similar case, see Espenship's Estate,[121] where the court held that the power could not be exercised except so far as was necessary to pay the debts and legacies, and its exercise was accordingly restrained within the limits specified.

In Eberly v. Koller,[122] there was a case stated between the executor and the purchaser to determine the validity of the title offered by the executor under the power. There was a general power of sale conferred without any purposes disclosed except the phrase "for the purpose of executing this will," which would seem to be superfluous. No other provisions of the will were set forth. It was held, in an opinion by Biddle, P. J., in the court below, affirmed on appeal by the Supreme Court without an opinion, that since no necessity for making the sale was shown, the executors could not make title.

A common form of will is where the testator divides the residue into several different shares creating a trust as to some or all, and then inserts a general power of sale at the end of the will. If the same persons, as is generally the case, are appointed executors and trustees, the power may be of assistance in performing the duties as executor or may be of assistance in performing the duties as trustee under the trust created, and such a power will therefore probably survive so long as any of the trusts remain.

Whenever, therefore, there is a general power of sale conferred without any purpose disclosed, and it appears from the whole will that the exercise of the power is necessary either to

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[121] 13 Pa. C. C. 294 (1893).
[122] 209 Pa. 208 (1904).

pay debts, provide for charges in the will or as incident to distribution of the property or as incident to a trust created in any part of the will, the power may be exercised and a good title conferred thereunder so long as any one of the reasons for the objects specified remains, and since the testator may postpone the distribution of his estate to any time in the future, so long as he does not violate the rule against perpetuities, the power of sale may be valid for a period of time extending over one or perhaps two generations, and the law is probably the same where the executor and trustee are not the same person, although in this case it would be safer for the purchaser to see that the purchase money is properly distributed under the limitations in the will.

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